91-1608

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October 1991 Term

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,

Petitioners

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

to the Petition for Writ of Certiorari

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Notation of corporate status: No Petitioner is a subsidiary or parent of another corporation.

No. 91-8036
United States Court of Appeals,
Fifth Circuit
Jan. 17, 1992
(950 F. 2d 1129)
Rehearing denied February 24, 1992

SAVE BARTON CREEK ASSOCIATION,
WE CARE AUSTIN and AUSTIN CROSSROADS,

Plaintiffs-Appellees and Cross-Appellants

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and
TEXAS STATE DEPARTMENT OF HIGHWAYS AND
PUBLIC TRANSPORTATION (TDH),

Defendants-Appellants and Cross-Appellees,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,

Intervenor-Defendant and
Appellant-Cross-Appellee.

PER CURIAM:

Plaintiffs/appellees,[1] Save Barton Creek Association, We Care Austin, and Austin Crossroads, three local environmental organizations, brought suit against the defendants/appellants, the Federal Highway Administration ("FHWA"), the Texas State Department of Highways and Public Transportation ("TDH"), and the MoPac South Transportation Corporation ("Corporation"), seeking to enjoin the construction of two highway projects in Austin, Texas. These projects are MoPac South and Segment 3 of a proposed Austin Outer Loop. The district court enjoined the appellants from all construction and development activities on MoPac South south of Hannon Lane and on the entire Austin Outer Loop pending their compliance with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-61 (1982). We reverse.

I. FACTS AND PRIOR PROCEEDINGS

MoPac South and Segment 3 are two roadways planned and now partially constructed in a portion of southwest Travis County, Texas. MoPac South is a 5.5 mile southern extension of a north-south freeway, MoPac, located in West Austin. It was conceived in the early 1980's as a major radial roadway to serve South Austin. Also conceived in the early 1980's, the Austin Outer Loop is a proposed 82

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[1] Note, the plaintiffs cross appeal on three narrow issues: 1) that the district court ignored their "unclean hands" argument to the defendants' equitable laches defense; 2) that the court erred by failing to order NEPA compliance for the year 2006 second phase of MoPac South; and 3) that the court erred in allowing the Corporation to intervene in this case. Since we reverse the district court's injunction, these issues are moot.

mile circumferential freeway which in planning has been divided into five segments. The segment which is to be built in the southwest corridor of the Austin Outer Loop has been designated by the TDH as Segment 3, the second roadway project in dispute. Segment 3 is the portion of the contemplated Austin Outer Loop which will intersect with the southern terminus of MoPac South. Both of these highways, MoPac South and Segment 3, traverse the Austin-area Edwards Aquifer, a sole source drinking water aquifer in southern Travis and northern Hays Counties, southwest of Austin.[2]

The appellees instituted this suit for declaratory and injunctive relief requesting a declaration that the Austin Outer Loop, including Segment 3, and MoPac South were "major Federal actions" for the purposes of NEPA and required the preparation of a regional environmental impact statement ("EIS") prior to their construction. The appellees alleged that the FHWA was in violation of NEPA for allowing continued construction of MoPac South when it was tied in with the rest of MoPac, which was built with federal aid, and also in planning for the construction of the Austin Outer Loop. Furthermore, specifically with regard to the Austin Outer Loop, they asserted that the FHWA allowed the project's unlawful segmentation. Additionally, the appellees argued that the state defendants, the TDH and the Corporation, were acting to frustrate federal environmental law by characterizing the most environmentally sensitive segments of these highway projects as state projects exempt from NEPA. The appellees also contended that the failure to prepare a regional environmental impact statement ("EIS") under NEPA on the Austin Outer Loop would result in irreversible contamination of the Edwards Aquifer, causing a

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[2] We sketch a factual overview of the case here, reserving a further detailing of the facts for our analysis below.

significant hazard to public health.

After conducting a fact intensive bench trial,[3] the district court concluded that commencing construction of Segment 3 without NEPA compliance was improper because the Austin Outer Loop was a proposal for "major Federal action." Thus, Segment 3 could not be segmented from the overall proposal and funded separately prior to completion of the environmental assessment process on the entire Austin Outer Loop pursuant to NEPA. With regard to MoPac South, the district court held that since it had been planned

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[3] Prior to the bench trial, the parties filed a proposed agreed pretrial order containing extensive stipulation of facts. On appeal, a controversy ensued concerning the stipulations. The stipulations on record are divided generally into three groups: stipulations # 1-50, stipulations # 61-63, and stipulations # 64-299. The appellees assert that the district court did not accept the proposed pretrial order for stipulations # 61-299, and thus, the stipulations are largely moot. In essence, according to the appellees, this Court need not expend effort examining the proposed stipulations. In contrast, the appellants contend that, while the district court did not sign the pretrial order, it was duly filed and entered. Furthermore, the district court's memorandum opinion and order was based on the testimony and evidence presented and upon consideration of the arguments of counsel; that body of record evidence included numerous references to the parties' stipulations. Additionally, throughout the bench trial, the district court permitted counsel freely to refer to the stipulations.

At no point before, during, or after the trial did the district court state or imply that it would not accept the stipulations generally or had rejected them specifically. Ultimately, according to the appellants, the appellees have demonstrated no good reason to depart from the accepted rule that matters which are stipulated in the pretrial order are binding upon the parties, absent some modification, and usually cannot be pursued on appeal. Our review of the record also indicates that the appellees themselves utilized the same stipulations they asserted should be rendered largely moot. Consequently, this Court has applied all the stipulations as relevant.

for construction as a part of Segment 3, itself an integral part of a federal project, MoPac South "must necessarily be an integral part of a federal project and subject to NEPA." Furthermore, MoPac South was subject to NEPA "because the project is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290, and the Austin Outer Loop), and it lacks substantial independent utility." Additionally, intimating but in no way describing or making findings about some surreptitious actions on the part of the appellants, the district court alluded to "the questionable nature of the TDH's activity" as well as to the fact that "the evidence does not reveal any measurable good will on the State's part."

In addressing the extent of the injunctive relief, the district court acknowledged the futility of enjoining the construction of MoPac South from U.S. 290 to Slaughter Lane, which was 96% complete, and the construction of MoPac South from Slaughter Lane to Hannon Lane, which was 42% complete. All construction on the Austin Outer Loop and MoPac South south of Hannon Lane, however, was enjoined until the completion of the procedures provided under NEPA for "major Federal action." The district court conceded it could not determine the requisite environmental studies needed to be conducted on the projects. The court simply asserted that it trusted that the federal law could define the requirements of the NEPA EIS. Though it recognized that it lacked the high level of technical expertise to determine whether a regional EIS was necessary, the court did order TDH to prepare an EIS on Segment 3. The district court did not disturb in any way an earlier finding it had made that there was no evidence with respect to environmental injury

resulting from construction of Segment 3 and MoPac South.[4]

II. DISCUSSION

The appellants advance three basic contentions. First, they urge that the appellees' claims are not ripe for judicial review because there has been no "final" administrative action that would permit construction of the proposed highway projects using federal funds. Second, they assert that the TDH has been solely responsible for the planning, design, and construction of both MoPac South and Segment 3 of the Austin Outer Loop. Since state-funded projects are not controlled by FHWA and in no way obligate the federal government to any present or future acts, the highway projects cannot be labeled as "major Federal actions" for the purposes of NEPA. Third, the appellants concede that case law and the FHWA regulations do establish that under certain circumstances, segmentation of federal-aid highway projects can be improper under NEPA. According to the appellants, however, in applying these principles to these projects it is apparent that neither MoPac South nor Segment 3 of the Austin Outer Loop has been improperly segmented from a federal-aid highway project.

A. Ripeness

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[4] At a hearing for a preliminary injunction, the district court heard testimony of the appellees' own expert that no documented case exists in which a highway construction has ever contaminated an aquifer. Furthermore, none of the witnesses were able to offer substantiated evidence of injury to the aquifer. The appellees had relied on the fact that the aquifer has been designated a sole source drinking aquifer, and thus vulnerable to contamination. Ultimately, although the court recognized the aquifer's vulnerability, it found that the appellees had failed to prove substantial threat of irreparable injury if the injunction was not granted.

According to the appellants, this case cannot be ripe for judicial decision absent a final action by the FHWA. Judicial review of federal agency action is governed by the requirement of Section 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (1982), which provides that only "final agency action" is subject to judicial review. See, e.g., Lujan v. National Wildlife Fed'n, --- U.S. ----, 110 S.Ct. 3177, 3185, 111 L.Ed.2d 695 (1990). The appellants contend that even if one assumes for argument's sake that the district court could have found that NEPA does apply in this case, the FHWA has taken no final action upon which to base APA review as to either MoPac South or any part of a proposed Austin Outer Loop. The FHWA has not approved a draft EIS for public circulation, a final EIS, a location, or funding for any part of either MoPac South or Segment 3 of the Austin Outer Loop.

We recognize that the requirement of finality has been applied in actions seeking to enjoin on environmental grounds the construction of highways. The appellants point to several cases in which the rule requiring finality and the related and overlapping doctrine of ripeness have been exercised to conclude that court intervention would not only be a waste of judicial resources, but also improper interference in the administrative process. Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 243 (10th Cir.1991) (finding Ash Creek's action unripe for judicial review because it has failed to show that the "Department [of Interior]'s proposed exchange of the Ash Creek Coal Leasing Tract for the Whitney Benefits Tract constitutes 'final agency action' ") (emphasis in original); Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir.1980) (concluding that the Corps of Engineers' issuance of a recommendation report of further study of the Hudson River Skimming Project not yet under construction could not be characterized as a "final agency

action"); Eastern Connecticut Citizens Action Group v. Dole, 638 F.Supp. 1297, 1299-1300 (D.Conn.), aff'd per curiam, 804 F.2d 804 (2d Cir.1986), cert. denied, 481 U.S. 1068, 107 S.Ct. 2460, 95 L.Ed.2d 869 (1987) (finding the claims not ripe for judicial review because, inter alia, no construction had begun on proposed Relocated Route 6).

These cases are properly distinguishable from the case on appeal. Our decision does not resolve a dispute concerning "a hypothetical highway"; we are not "adjudicating the legality of non-events." See National Wildlife Fed'n v. Goldschmidt, 677 F.2d 259, 263 (2d Cir.1982). This case involves concrete disputes over tangible interests having immediate and practical impact. We acknowledge that the two projects at issue may become a part of a larger project. But that project may never come to fruition. At this stage, Segments 1, 2, 4, and 5 of the Austin Outer Loop are merely tentative, preliminary, and at best contemplated actions. We must address the issues raised, however, because they arise from the portions of the proposed larger project which have been or are being built.

As of the date of the district court's decision, construction of MoPac South from U.S. 290 to Slaughter Lane was 96% complete, and construction of MoPac South from Slaughter Lane to Hannon Lane was 42% complete.[5] Additionally, construction of Segment 3 was approximately 10% complete. We are governed by the finality requirement which is to be interpreted in a "pragmatic way." Abbott Lab. v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 1516, 18 L.Ed.2d 681 (1967). We hold that this case cannot be dismissed on ripeness grounds. These projects have left the

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[5] Furthermore, as the district court acknowledged, the TDH has expended over $10,000,000 in the construction of MoPac South and the Corporation has donated over $10,000,000 worth of right-of-way and services to the state for MoPac South.

drawing board and have entered varied stages of construction. Thus, we turn to the question of whether these projects fall within the purview of NEPA.

B. Major Federal Action

The district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an erroneous legal conclusion that the Austin Outer Loop constitutes a " 'proposal for major [F]ederal action' subject [to] an environmental document." NEPA requires that federal agencies consider the environmental consequences of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The requirements of NEPA, which include, among other things, the submission of an EIS, apply only when the federal government's involvement in a project is sufficient to constitute "major Federal action."[6] Thus, the dispositive issue in this case is

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[6] The statutory and regulatory criteria for federal-aid highway funding is an elaborate, intricate scheme. Title 23 of the United States Code sets forth the legal framework for the federal-aid highway program, which is, in reality, a federally assisted state program. 23 U.S.C. § 145 (1988). The states own, construct, and maintain the highways which form the federal-aid highways within their borders. The state's incremental stages of highway construction are included in the state's programs of projects which are submitted to the FHWA for approval pursuant to 23 U.S.C. § 105. Section 105 of 23 U.S.C. provides that a state desiring to avail itself of the benefits of federal assistance must submit to the FHWA a program of projects for which federal aid may be sought, known as the "105 Program." Recognizing that a state ultimately may not seek federal aid for some projects on a 105 Program, the FHWA regulations contemplate early environmental coordination between the state and the FHWA, prior to the state's actual proposal and request for federal funding assistance. 23 C.F.R. § 771.111.

Programs may be approved in whole or in part, but the FHWA

whether at this juncture sufficient federal involvement exists in the Austin Outer Loop Project to constitute "major Federal action" affecting the environment under NEPA. We are cognizant that "[t]he purpose of NEPA is to require that federal decision-makers consider the environmental consequences of their actions before deciding to proceed." Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir.1976) (en banc) (emphasis added).

No litmus test exists to determine what constitutes "major Federal action." Furthermore, "[f]ederal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA." Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1480 (10th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1017, 112

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is prohibited by law from approving any project on a proposed program which is not part of an approved federal-aid system. Program approval does not constitute an obligation of funds, or establish a date of eligibility for federal funding. 23 C.F.R. § 630.112(c) (1991). If a project is to be federally funded, however, it must first be listed on a program approved by the FHWA. In addition to being part of an FHWA approved federal-aid highway system and included in an approved Section 105 Program, a project must also meet the requirements of environmental regulations to qualify as an FHWA project. Under the FHWA regulation, a project cannot be eligible for agency funding unless: it is determined to be a categorical exclusion (need not be subject to environmental analysis); is found to have no significant impact as a result of an environmental assessment; or is the subject of an FHWA approved final EIS and record of decision. 23 C.F.R. § 771.113. Furthermore, for a highway to qualify for federal-aid funding, it must also have its plans, specifications, and estimates approved by the FHWA, and receive prior concurrence from the FHWA before the award of the construction contracts.

None of these requirements has been met by either MoPac South or any segment of the Austin Outer Loop. Accordingly, neither project is presently eligible for federal funding, and neither is a federal-aid highway project subject to NEPA as a result of asserted FHWA involvement.

L.Ed.2d 1099 (1991). Yet both the federal regulations and the courts have attempted to provide guidance as to what constitutes "major Federal action."

The Council on Environmental Quality ("CEQ") has issued regulations defining "major Federal action." These regulations are entitled to substantial deference. Andrus v. Sierra Club, 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979). The regulations provide that "major Federal action" encompasses not only actions by the federal government, but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (1991) (emphasis added). The district court placed heavy reliance on this regulation in making its determination that the Austin Outer Loop is a "major Federal action."

We recognize that "major Federal action" can exist when the primary actors are not federal agencies. Nonetheless, the district court appears to have placed undue reliance on only a portion of the CEQ's regulation by focusing solely on the "potentially subject" factor, while dismissing with seeming facility the "Federal control and responsibility" factor. "[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes [the decision-maker] has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over outcome." W. Rodgers, Environmental Law § 7.6, at 763 (1977).

In an attempt to find the requisite amount of federal involvement necessary to trigger the applicability of NEPA, some courts have echoed the CEQ's regulations and the suggestions of commentators, and asserted that the touchstone of "major Federal action" constitutes a federal agency's authority to influence nonfederal activity. "[T]he federal

agency must possess actual power to control the nonfederal activity." Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir.1988). See, e.g., Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333, 1347 (5th Cir.1979) (federal funding assistance for local planning process does not alone constitute "major Federal action" where all decisions are entrusted to the state and local agencies).[7] Ultimately, "we do not quarrel with the proposition that federal involvement can in some circumstances be so massive, so pervasive, that 'the acts of the state are in reality federal actions.' " Atlanta Coalition, 599 F.2d at 1346 (citation omitted).[8]

The extensive record on appeal, however, fails to show any evidence of any significant federal involvement, much less "massive" involvement. At the present time, work on MoPac South and Segment 3 of the Austin Outer Loop has progressed through right-of-way acquisition to construction without FHWA approval or funding. Furthermore, state and local funding of these projects can never be reimbursed by the FHWA because the state did not

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[7] Another characterization of this control factor is whether federal involvement in a nonfederal project is sufficient to "federalize" the project for purposes of NEPA. See, e.g., Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir.1986); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836, 101 S.Ct. 110, 66 L.Ed.2d 43 (1980). The appellees contend that both Segment 3 and MoPac construction should not commence prior to a NEPA analysis because the number of federal controls on both projects is adequate to "federalize" them.

[8] A less pervasive view is that a highway project constitutes a "major Federal action" upon receipt of location approval from the FHWA. See, e.g., City of Boston v. Volpe, 464 F.2d 254 (1st Cir.1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir.1971); Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D.Cal.1972).

obtain prior authorization from the FHWA for the expenditure of funds, did not obtain FHWA approval of plans, specifications and estimates, and did not obtain concurrence from the FHWA before awarding the construction contracts. 23 U.S.C. §§ 106, 112(d) (1988); 23 C.F.R. § 1.9(a) (1991).

In actuality, no federal funds have been requested or spent, and no federal approvals have been given. The state is simply building some highways for its own use. Of particular importance is the fact that the federal authorities strongly disavow any interest in these highways. They also are appellants with the state officials in this case. The only federal touching of the projects at all consists of state officials taking advantage of the FHWA's early coordination procedure and beginning to compile NEPA compliance documentation so as to preserve state eligibility for federal funding.

Though the district court acknowledged that "[t]he mere prospect of future federal funding is not enough," it did take specific notice that according to the "Current Status Report" on the Austin Outer Loop, Segments 1, 2, 4, and 5 "are headed for some federal funding." Furthermore, the court specifically referred to testimony from a TDH engineer that at the estimated cost of the Outer Loop, somewhere between $400 and 800 million, the project is " 'not likely' [to] be funded by the state alone." Additionally, although the district court recognized that the TDH has not requested any federal aid for any section of the Austin Outer Loop, it found the probability of a request for federal funding "too great" to allow the TDH to construct one portion of the Austin Outer Loop without following federal law. This Court has recognized, however, that "the possibility of federal funding in the future for a project or group of projects does not make that project or projects 'major [F]ederal action' during the planning stage." Atlanta Coalition, 599 F.2d at 1347

(citations omitted). See also City of Boston v. Volpe, 464 F.2d 254, 258 (1st Cir.1972) ("[T]he adoption of certain federal standards and specifications in the hope of qualifying for federal assistance cannot transform a state or local project into a federal one").

Furthermore, even if the district court were correct that the state contemplates constructing some of the speculative Austin Outer Loop with federal funds, it does not follow that an EIS is now required. Until there has been a "proposal,"[9] and until there has been a "recommendation or report" on that proposal, there is no requirement for an EIS.[10] Kleppe

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[9] A " '[p]roposal' exists at that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23 (1991).

[10] The Congress authorizes and directs that, to the fullest extent possible: ... (2) all agencies of the Federal Government shall--

* * * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA § 102, 42 U.S.C. § 4332 (emphasis added); see also 40 C.F.R. § 1508.12 (1991) (defining "federal agency"); id. § 1508.18 ("major Federal action"); id. § 1508.27 ("significantly"); id. § 1508.3

v. Sierra Club, 427 U.S. 390, 405-06, 96 S.Ct. 2718, 2728, 49 L.Ed.2d 576 (1976) (quoting Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320, 95 S.Ct. 2336, 2356, 45 L.Ed.2d 191 (1975)). The "proposal" requirement, then, is a statutory requirement grounded in the language of Section 102(2)(C) of NEPA that governs the time when an EIS should be prepared. In essence, the appellees can prevail only if there has been a report or recommendation on a proposal for "major Federal action" with respect to MoPac South and Segment 3 as part of a possible future Austin Outer Loop. In concluding that the Austin Outer Loop is a "proposal" for "major Federal action," the district court incorrectly elevated FHWA's early coordination process to the status of a "proposal" under NEPA.

Our scrutiny of the record shows that neither MoPac South nor any segment of the Austin Outer Loop, including Segment 3, has yet acquired the status of a formal proposal requiring federal approval. The district court placed much emphasis on the state's preliminary planning steps taken on the two projects, particularly the state's early compliance with the eligibility requirements for federal funding for MoPac South and Segment 3.

Initially, the TDH explored the possibility of making MoPac South eligible for § 105 Program federal-aid funding. Accordingly, the TDH submitted an environmental assessment ("EA")[11] for MoPac South to the FHWA's Division Office in Austin. The TDH's submission determined that MoPac South, if federal funds were sought,

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("affecting"); id. § 1508.14 ("human environment").

11 An environmental assessment is a brief public document that, inter alia, provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).

would warrant the preparation of a NEPA EIS. However, the FHWA never committed nor reimbursed any funds for the planning, design, right-of-way acquisition, or construction of MoPac South. Additionally, in September 1988, the FHWA informed TDH that MoPac South was ineligible for federal funding because it was not then on any federal aid system. In essence, though the TDH originally contemplated potential federal involvement, nothing ever came to fruition. The TDH planned the location and design of MoPac South without FHWA overview or approval. Although there was some preliminary consideration during the early developmental stage of an application for federal funds, the project became purely a function of the state.

With regard to Segment 3, the TDH prepared an overview environmental assessment ("OEA") for the Austin Outer Loop, stating the history of the project, the need for it, and potential alternatives to the project. The OEA also established that the Austin Outer Loop would be divided into four segments for planning and development purposes. Intending to preserve federal aid eligibility for the Austin Outer Loop segments, the TDH submitted the OEA to the FHWA in 1986 for early NEPA coordination analysis. The FHWA approved the OEA in January 1987. The FHWA subsequently announced that the Austin Outer Loop would be segmented into multiple segments for the purposes of design, planning, environmental review, and construction approval. 52 Fed.Reg. 32,090 (Aug. 25, 1987).

Since the August 1987 Federal Register segmentation announcement, the Austin Outer Loop has undergone two re-segmentations. In September 1987, TDH approved a re-segmentation of the original Segment 3 into 3A and 3B, and subsequently informed the FHWA of its actions. Expressing concern about the proposed re-segmentation, the FHWA continued collaborating with the TDH to make the segments meet the requirements to maintain federal funding

eligibility.

Ultimately, the TDH concurred with the FHWA's suggestion to divide the Austin Outer Loop into five segments, each ending at major radial roadways. This proffered segmentation is the current division of the proposed Austin Outer Loop. In essence, the only control FHWA has exercised to date over the Austin Outer Loop is the suggestion of its re-segmentation in order for TDH to retain eligibility for federal aid funds. Segment 3 is just one of many state projects that has federal assistance at an exploratory stage and then is completed wholly through state funding.

Upon reviewing the record, particularly the evidence found persuasive by the district court,[12] we find that none of the early coordination activities by the state with the federal government constitute the requisite "major Federal action." The crux of the district court's opinion was a determination that the Austin Outer Loop is a " 'proposal for major [F]ederal action.' " Having made that assessment, it rather cursorily concluded that Segment 3 is an integral part of a federal project, as is MoPac South, since it was planned for construction as part of Segment 3.

Because of the district court's complete reliance on the

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12 The appellees were also significantly influenced by the state's early coordination actions. They attempted to contest the "proposal" notion by simply stating that the Austin Outer Loop project had "reached a very highly defined level prior to suit." According to the appellees, the project was sufficiently defined to support the FHWA's "very public announcement of NEPA environmental impact statements"; it was sufficiently defined to support FHWA approval of a NEPA environmental assessment; and finally, by the time of trial, NEPA EISS were being drafted for all segments except Segment 3. Of course, the preliminary drafting of an EIS is a step far removed from federal approval, and indeed may be used by the state to make its own environmental evaluation.

Austin Outer Loop as a "major Federal action," some further evaluation of the status of the Austin Outer Loop is necessary. Major construction projects, like the Austin Outer Loop, customarily change in design, cost, scope, and impact over the years required for development. The segments of the Austin Outer Loop are planned to be constructed at different times in the future over a period of many years. Furthermore, the financing, specific location, and construction timing of other segments are subject to change. More important, some segments of the Austin Outer Loop may never be built. In essence, the construction of an outer loop around Austin is, at most, a contemplated action, which at this point exists only as a concept in a long range plan that is subject to constant revision. The record is silent with regard to any meaningful federal participation or control exercised over the project in this case. There has been no federal commitment and only minimal federal intervention.

Since the FHWA has at this time given no approvals--whether it be approval of a final EIS, approval of design, approval of location, or approval of funding--there has been no "major Federal action" in connection with any segment of the Austin Outer Loop. The "federal imprimatur" that sometimes attaches to state projects is simply not present in this case. Hawthorn Envtl. Preservation Assoc. v. Coleman, 417 F.Supp. 1091 (N.D.Ga.1976), aff'd per curiam, 551 F.2d 1055, 1056 (5th Cir.1977). A state may, after all, proceed with construction of its projects wholly independently of the federal government.

Our holding today is consistent with other recent precedent. In Macht v. Skinner, 916 F.2d 13, 16 (footnote omitted) (D.C.Cir.1990), the Court held that while the Urban Mass Transportation Administration ("UMTA") had given Maryland $2.5 million for preliminary engineering studies and environmental impact statements for the proposed extensions to the Light Rail Project, and while Maryland had

to obtain an Army Corps of Engineers permit, these facts were insufficient "to transform the entirely state-funded Light Rail Project into 'major [F]ederal action' affecting the environment within the meaning of NEPA." Furthermore, the Court was unpersuaded by the contention that the project constituted "major Federal action" because Maryland had hoped to obtain a $40 million UMTA grant to build extensions to the state project sometime in the future. According to the Court, "in this era of federal fiscal shortcomings there is a wide gulf between what a state may want and what the federal government is willing to provide." Id. at 17 (citing district court memorandum opinion). The D.C. Circuit Court rejected requiring NEPA environmental consideration at a far higher threshold of federal activity than is present in the case before us.

The Tenth Circuit made a similar determination in Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991). Faced with a state-planned highway bridge project which had retained eligibility for federal funding, the Court rejected the contention that the FHWA's assistance in, and approval of, the EIS was sufficient to make the bridge project a "major Federal action" within the purview of NEPA. Further, and relevant to our case, the Court asserted:

> Congress has not applied NEPA to all highways that the states are eligible to fund with federal dollars.... The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative option (using state dollars) might result in less adequate assessment of environmental

> considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement.

906 F.2d at 1481 (quoting Citizens for Balanced Env't & Transp., Inc. v. Volpe, 376 F.Supp. 806, 812-13 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975) (emphasis in original)). Here again the Court found that a much higher level of federal commitment and involvement than that present in the case before us (an EIS having been prepared and approved) as insufficient to constitute "major Federal action."

The appellees assert that the mechanistic approach to "federal" status advocated by the appellants, the FHWA, the TDH, and the Corporation, would make NEPA a "dead letter law for highway projects." We disagree. To the contrary, the appellants are merely adhering to the law and are recognizing that Congress limited the EIS requirement to "major Federal actions." "Although desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex.L.Rev. 801, 837 (1977) (footnote omitted). See also Movement Against Destruction v. Volpe, 361 F.Supp. 1360, 1383 (D.Md.1973), aff'd, 500 F.2d 29 (4th Cir.1974) ("Despite the breadth of the NEPA, its application is only to the decision making processes of the Federal government.") (citation omitted).

In sum, the error of the district court lies in concluding that these two highway projects are an integral part of an Austin Outer Loop. The outer loop does not exist

except in speculative plans for years ahead. The federal authorities as well as state authorities recognize this. The undisputed facts are that Segment 3 and MoPac South have been financed with non-federal funds and have been designed and built without federal approval and authorization. We hold that these projects do not constitute nor are they are part of any project constituting "major Federal action" within the contemplation of 42 U.S.C. § 4332(2)(C).

C. Segmentation

We have recognized that the proposed Austin Outer Loop as yet has not even achieved a nascent state. Both federal and state governments agree that this is not a highway plan for an outer loop which can at the present time be classified as a "major Federal action" and also be eligible for federal aid. There remains the assertion that the state has chosen the most environmentally sensitive segment of this highly tentative plan for immediate construction without federal aid for the purpose of avoiding NEPA. While the district court hinted at this possibility, it did not so hold and did not make findings that would support it.[13]

The case law which deals with such improper segmentation almost always involves a situation where a "major Federal action" is found to exist and then the segmentation is evaluated as an escape from the NEPA

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13 Without specifically accusing the state of covert or surreptitious actions, the district court stated that TDH's "intentions regarding Segment 3 may have been on the 'up and up': however, the evidence does not reveal any measurable good will on the State's part." Perhaps the district court by this wording was trying to avoid a harsh statement of criticism of the state officials. But the fact must be faced that the lack of proof of "measurable good will" has no legal significance. The record reveals no proof of ill-will or impropriety.

application which is otherwise immediate.[14] See, e.g., Macht v. Skinner, 916 F.2d 13, 16 n. 4 (D.C.Cir.1990) ("Because we hold that the Light Rail Project does not involve 'major [F]ederal action,' we do not decide whether the district court correctly held that Maryland's segmentation of the Project was proper."). Segmentation cases consider only whether a federal project has been improperly segmented to avoid compliance with NEPA. See, e.g., Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60 (D.C.Cir.1987); Swain v. Brinegar, 542 F.2d 364 (7th Cir.1976) (en banc); Indian Lookout Alliance v. Volpe, 484.

The possibility does exist, however, that a state could improperly segment out critical portions of a proposed project before the project was developed to the stage of becoming a "major Federal action." By this means, a state could circumvent those segmentation actions which would be found to be illegal if the project were developed to the "major Federal action" stage. Segmentation analysis functions "to weed out projects which are pretextually segmented, and for which there is no independent reason to exist. When the segmentation project has no independent jurisdiction, no life of its own, or is simply illogical when viewed in isolation, the segmentation will be held invalid." Macht v. Skinner, 715 F.Supp. 1131, 1135 (D.D.C.1989) (emphasis in original), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table). Further, in Village of Los Ranchos de Albuquerque, the Tenth Circuit distinguished its case from a case in which local defendants

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[14] Short of a completely exhaustive search, we found only two cases in which there was an evaluation of segmentation without a finding of "major Federal action." See Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir.1990); Macht v. Skinner, 715 F.Supp. 1131 (D.D.C.1989), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table) (an earlier decision in a related case to the case referred to in the immediately following text).

were involved "in a sham transaction to evade federal environmental requirements." Id. at 1482. We consider whether such a subterfuge by the state occurred.

In making its determinations, the district court relied heavily on Hawthorn Environmental Preservation Association v. Coleman, 417 F.Supp. 1091 (N.D.Ga.1976), aff'd per curiam, 551 F.2d 1055 (5th Cir.1977) and Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir.1971), cert. denied, 406 U.S. 933, 92 S.Ct. 1775, 32 L.Ed.2d 136 (1972) (hereinafter San Antonio I). This reliance was pivotal. The district court may have felt compelled to find a probability of "major Federal action," so as to curtail the result of what it perceived as a "naturally suspect" motive--the segmentation of the Austin Outer Loop at the portion which traverses the Edward's Aquifer. The trial court's inexorably intertwined analysis of "major Federal action" and segmentation requires this Court to address the issue of segmentation even though there is strong case authority that segmentation does not become an issue until "major Federal action" is established.

"Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. This claim is a major part of the charge made by plaintiffs in this case. "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. Unit B 1981). Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related

projects.[15] See, e.g., Piedmont Heights, 637 F.2d at 439; San Antonio I, 446 F.2d at 1024-26. In the context of a highway within a single metropolitan area, as the case at issue--as opposed to projects joining cities--courts have focused more on the factor of "independent utility." See, e.g., Coalition on Sensible Transp., 826 F.2d at 69; Piedmont Heights, 637 F.2d at 440. Consequently, our analysis, while assigning the other factors their modest weight, will focus primarily on the "independent utility" factor. See, Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101, 1108 (N.D.Tex.1985) ("the illogic of a terminus is at best a secondary inquiry, shadowed by the independent utility inquiry") (citation omitted).

With these considerations in mind, we address Hawthorn and San Antonio I. Contrary to the district court's determination, we find that these cases posit significant and controlling differences with our present case.

In Hawthorn, the construction of a bypass of the City

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[15] These factors are embodied in the FHWA's NEPA implementation regulations.

> (f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:
> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> (2) Have independent utility or independent significance ...; and
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f) (1991). Of course, absent a finding of "major Federal action," these criteria do not apply. They apply only "to actions where [FHWA] exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals ... are not subject to this regulation." Id. at 771.109(a)(1).

of Newnan, Georgia, was at issue. To perform its intended function, the entire bypass had to be constructed. The bypass had been conceived as one project and its two segments, Phase I and Phase II, were proposed to be constructed simultaneously. It was also clear that absent the construction of Phase II, the segment proposed for federal funding, Phase I, the state funded segment, would not be constructed because it could not be utilized. The court, acknowledging the "sufficiently great prospects" of Phase II becoming 'major Federal action,' " focused on the question of segmentation. 417 F.Supp. at 1101. It found that absent any persuasive evidence of independent utility, "the defendants had violated the mandates of federal environmental law and policy by failing to conduct proper studies concerning the construction of [Phase I] of the Newnan Bypass." Id. The court properly held that Phase I was merely a segment of an overall project, consisting of both Phase I and Phase II, and the provisions of NEPA were applicable.

In contrast, the segments of the Austin Outer Loop are planned to be constructed if at all at different times in the future over a period of years. It is not one continuous project as anticipated in Hawthorn. Further, our review of the record indicates that unlike the state-funded segment of the Hawthorn bypass, the partially constructed segment of the Austin Outer Loop, Segment 3, as well as MoPac South, will have substantial independent utility. Together, they will serve a highly useful urban traffic purpose even if no other segments of the Outer Loop are ever constructed.

San Antonio is also readily distinguishable on its facts from this case. There, the Secretary of Transportation had approved Texas' request for federal participation, authorization, and financial assistance in a highway project which was to cross San Antonio's Brackenridge Park. The project was challenged for failure to comply with Section 4(f) of the Department of Transportation Act, which generally

prohibits, inter alia, the use of federal funds to build highways through parks of local significance.[16] The state then decided to divide the project into three segments. The federal government would be asked to fund the two end segments, and the state would fund the middle segment that would actually cross the park. This Court found that the state had impermissibly segmented a highway project running through park lands in order to evade federal environmental regulations. It was deemed significant that segments of the highway on both sides of the park were to be constructed with federal funds, and none of the three segments had logical termini or independent utility. In clear contrast, both the segment of the Austin Outer Loop as well as MoPac South fully comport with both case law and FHWA's regulations requiring that segments have independent utility, connect with logical termini, and do not foreclose the opportunity to consider alternatives.[17]

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[16] Section 4(f), formerly at 49 U.S.C. § 1653(f), was repealed in 1983 when it was codified without substantive change as 49 U.S.C. § 303. See also 23 U.S.C. § 138. The policies section 4(f) engendered, however, are still widely referred to as "section 4(f) matters." See, e.g., 23 C.F.R. Part 771 (1991).

[17] The Austin Outer Loop is more closely analogous to the 3-A system of interstate and primary highways in the City of Baltimore which was the subject of litigation in Movement Against Destruction v. Volpe, 361 F.Supp. 1360 (D.Md.1973) (per curiam), aff'd per curiam, 500 F.2d 29 (4th Cir.1974). There, the plaintiffs challenged the FHWA's failure to prepare an EIS prior to its approval of the system plan for interconnected and interdependent highways. The court recognized that each component of the 3-A system served different functions and provided a useful facility even if the others were not constructed. It held that there was "no 'major [F]ederal action' which treated the 3-A system as a unit, and, therefore, under the plain language of the NEPA no EIS [was] required for the '3-A system' as a whole." Id. at 1383. See also Association Concerned About

None of the segments of the proposed Austin Outer Loop are scheduled for simultaneous or continuous construction as anticipated in Hawthorn and San Antonio I. The appellees have offered no evidence that any segment of the Austin Outer Loop is dependent on any other segment for its utility. The proper question is whether the Segment 3 project serves a significant purpose even if the other related projects, the other segments, are not built for a long time or perhaps not at all. See, Coalition on Sensible Transp. Inc. v. Dole, 826 F.2d 60, 69 (D.C.Cir.1987) (highway and interchange projects serve necessary purposes in absence of I-270 expansion and are sufficiently independent); Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 299 (D.C.Cir.1987) (per curiam) (substantial independent utility recognized in a four-mile section of mass transit project originally planned as 18.6 miles); Piedmont Heights, 637 F.2d at 440-41 (urban highway projects, although related to overall transportation plan, held to contribute individually to improving traffic conditions).

The contentions of the federal and state officials are sound. Segment 3 satisfies the FHWA's standards for proper segmentation. Segment 3 meets the significant criterion of independent utility. It increases the utility of the existing roadway network by providing effective access between two major radial highways. Segment 3 also will serve local needs. It will provide improved access to business and residential developments and to community and recreational features which will be accessible by intersecting roads. Furthermore, it will relieve traffic on arterial and city

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Tomorrow, Inc. v. Dole, 610 F.Supp. 1101 (N.D.Tex.1985) (finding that the segmentation of Loop 9 around Dallas County into segments or "legs" was an appropriate decision for the purposes of planning and development, including NEPA analysis; the legs of Loop were not proposed for contemporaneous construction and had significant independent utility).

streets. Segment 3 also satisfies the logical termini requirement. Its termini are located at nodes of commercial and traffic activity; they were chosen based on population and usage forecasts. Moreover, Segment 3 does not restrict consideration of alternatives. The construction of Segment 3 does not dictate that any other segment must be built, nor does it dictate the size of a segment if built, nor control the alignment of the rest of the Austin Outer Loop.

The appellees contend that the end points of Segment 3 drastically limit "the reasonable alternatives" for the end points of Segments 2 and 4. An answer to this contention is that Segment 3 is a state project to which the requirements of federal regulations do not apply. Assuming the regulations applied, however, Segment 3 would nonetheless comply with them. Segments 2 and 4 may never be built; neither segment is shown to be required to connect with Segment 3 in order to be functional. Even if Segments 2 and 4 were ultimately to connect with Segment 3, alternatives available for their location are many; the regulations require no more.

With regard to MoPac South, the district court ruled that it must comply with NEPA because it "is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290, and the Austin Outer Loop), and it lacks substantial independent utility." But this ruling when placed in its context would mean that every time a state or local government desires to build a non-federal aid highway project (MoPac South) that connects to existing federal highways (MoPac and U.S. 290), the project would be subject to NEPA because it would be "dependent" on the federal facilities. This extrapolation is attenuated at best. All proposed highways, when constructed, must eventually connect to an existing highway. Every roadway section that is added to a highway network is dependent upon and connected to the rest of the network. See, Named Individual Members of San Antonio Conservation Soc'y v. Texas

Highway Dep't, 496 F.2d 1017, 1024 (5th Cir.1974), cert. denied, 420 U.S. 926, 95 S.Ct. 1123, 43 L.Ed.2d 396 (1975) (hereinafter San Antonio (II)) ("virtually every road in the country crosses or interchanges with federal-aid highways, and ... there are many state-constructed roads which do not form a part of the federal network"). See also Village of Los Ranchos de Albuquerque, 906 F.2d at 1483 ("'Congress has not purported to apply NEPA requirements to [e]very highway that connects with a federally-funded highway' ") (quoting Citizens for Balanced Env't & Transp., Inc. v. Volpe, 376 F.Supp. 806, 810 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975)).

Ample evidence establishes that the MoPac and U.S. 290 highways have served a useful transportation function for years without the aid of MoPac South. These roads then cannot be the basis for a "lack of independent utility" finding in connection with MoPac South. MoPac South has utility independent from the Austin Outer Loop as well as Segment 3, and has a significant purpose even if the other projects are never built. Currently, as planned, MoPac South will be a limited access roadway, unlike any north-south roadway in southwest Travis county.

One of MoPac South's significant functions would be achieved regardless of the existence of Segment 3 as its southern terminus. MoPac South will serve local needs by improving the access for Austin residents to such community uses as retail establishments, places of worship, as well as cultural and recreational areas. The logical termini requirement is also satisfied. The north terminus of MoPac South is located at an intersection with U.S. 290, a major east-west highway, and connects with the existing MoPac, a major north-south highway, thus improving the efficiency of all three roadways. Moreover, MoPac South does not foreclose consideration of alternatives. For instance, to

appease the concern that MoPac South restricts alternatives because its southern-most point determines the alignment of Segment 3, the state designated Hannon Lane as the alternative southern terminus should Segment 3 not be built.

We have addressed the central question in the challenge of improper segmentation--whether Segment 3 and MoPac South serve significant purposes and have the requisite independent utility. The record clearly indicates that the two projects serve such purposes and are sufficiently independent even in the absence of MoPac, U.S. 290, and the Austin Outer Loop. This Court finds that both Segment 3 and MoPac South would meet the elements enumerated in Piedmont Heights to fall outside of NEPA's purview.

Finally, we feel compelled to address the district court's continuous reference to potentially suspect behavior on the part of the state.[18] The federal and state officials to the contrary rely primarily on Bennett v. Taylor, 505 F.Supp. 800, 810 n. 4 (M.D.La.1980), stating that, in NEPA suits, "motives of the state authorities are by and large irrelevant to this inquiry since the law applies to those projects specified by the Congress without regard to intent of either state or federal authorities." But the appellees in supporting the court's judgment place much reliance on Environmental Defense Fund v. Marsh, 651 F.2d 983, 999 n. 19 (5th Cir. Unit A 1981) to show the relevance of motive in an improper segmentation case. In Marsh, we stated that we believed Kleppe allows courts "to prohibit segmentation ... if an agency has egregiously or arbitrarily violated the

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[18] Comments by the district court included: "TDH's motive for segmenting the portion of the [Austin Outer Loop] which traverses the area most environmentally sensitive is naturally suspect," and "TDH's intentions regarding Segment 3 may have been on the 'up and up'; however, the evidence does not reveal any measurable good will on the State's part."

underlying purpose of NEPA." This principle is sound but it does not control this case.

In addressing the issue of motivation, we draw guidance from Macht v. Skinner, 715 F.Supp. 1131, 1135 (D.D.C.), aff'd, 889 F.2d 291 (D.C.Cir.1989) (Table). There, the district court suggested that the segmentation analysis advocated by Piedmont and its progeny has the effect of replacing "a subjective analysis of motivation with a set of objective criteria." Thus, "states are entitled to invoke the segmentation doctrine to insulate their construction projects from federal environmental law, so long as they meet the objective criteria of compliance." According to the court, "this is a legitimate choice for the State to make, and ... requiring [the State] to comply with NEPA simply because it has tried to plan its project so as to avoid federal law would be an unfair surprise." Id. (emphasis in original). See also Citizens for Balanced Environ. & Transp., Inc. v. Volpe, 376 F.Supp. 806, 813 (D.Conn.), aff'd, 503 F.2d 601 (2d Cir.1974), cert. denied, 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed.2d 100 (1975), in which the court said: "[T]he State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement."

We recognize that if a state has segmented for the purpose of evading federal environmental requirements and without other valid justifications, a holding of evasive violation would be justified. This Court does not "condone any form of subterfuge." San Antonio I, 446 F.2d at 1029 (Clark, J., concurring in part and dissenting in part). We have no such case here, and the district court made no findings leading to such a conclusion. Our review of the record reveals no improper segmentation. In this case, the

state entertained various options for Segment 3 and MoPac South and concluded that the use of state funds would enable it to proceed without the delays and expenses associated with compliance with federal environmental law.[19] There is nothing in the federal law to compel a state to ask for federal highway aid because there are environmental concerns. States are capable of dealing with environmental matters. Often overlooked is the limited scope of the federal legislation which recognizes this. We find no improper segmentation of a large highway project in this case.

III. CONCLUSION

Early coordination or compliance with the eligibility requirements for federal funding alone does not constitute a "proposal" for "major Federal action." Where the actions at issue have been taken by the state authorities without substantive federal supervision, authorization, commitment, or control, and will never be subject to review or approval by a federal agency, there can be no finding of "major Federal action" within the meaning of NEPA. With no control, right to control, or even the prerogative to suggest compliance with federal standards by FHWA, we find that the projects at issue are state projects. Both the state and federal governments agree. In this case, the state did not voluntarily submit itself

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[19] The evidence most relied upon by appellants in undertaking to establish improper motive in segmentation includes a portion from the Corporation's Technical Brief to the TDH and a letter from the Corporation's primary developer to an earlier TDH Chairman. In each instance appellees omitted following language that revealed clear concern by the TDH as to environmental matters and statements that the state planned its own environmental evaluations. The statement also indicated a need for expedited action and avoidance of long drawn-out federal proceedings--a valid state concern. See Macht v. Skinner, 715 F.Supp. at 1135.

to federal law. Further, there is no showing that the state segmented a larger project for the purposes of circumventing the application of federal law.

We reverse the judgment of the trial court and rule that both Segment 3 of the proposed Austin Outer Loop and MoPac South are state projects not subject to the requirements of NEPA.

REVERSED.

INJUNCTION DISSOLVED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
(March 6, 1990 - unpublished)

Civil Action A-89-CA-719

SAVE BARTON CREEK ASSOCIATION, WE CARE AUSTIN and AUSTIN CROSSROADS,
Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Defendants,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,
Intervenor.

MEMORANDUM OPINION AND ORDER

On the 7th-9th days of February, 1990, this case came on for trial before the Court without a jury. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the Court enters the following findings of fact and conclusions of law.

This is an action for declaratory and injunctive relief relating to the proposed construction of two highways--MoPac South and the Austin Outer Loop. MoPac South is a 5.5 mile freeway extension of an existing freeway, MoPac, in Austin, Texas. The Austin Outer Loop is an 84 mile circumferential freeway surrounding the City of Austin. Portions of both of these highways overlie the Edwards Aquifer, a sole source drinking water aquifer in southern Travis and northern Hays Counties, southwest of Austin. See Appendix "A." Plaintiffs, three non-profit corporations, allege that both highways have "synergistic environmental impacts" that require the highways to be the subject of an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act of 1969 ("NEPA), 42 U.S.C. §§ 4321 et seq. Plaintiffs allege that the Texas State Department of Highways and Public Transportation ("SDHPT") and the MoPac South Transportation Corporation ("Corporation") are acting to frustrate federal environmental law by characterizing the most environmentally sensitive segments of these highway projects as state projects exempt from NEPA. Additionally, Plaintiffs allege Defendant Federal Highway Administration ("FHWA") is in violation of NEPA for allowing continued federal participation in construction of MoPac and in planning for construction of the Austin Outer Loop. Plaintiffs further allege FHWA allowed the unlawful segmentation for purposes of environmental review of a single federal action, the Austin Outer Loop. Plaintiffs believe that the Defendants' failure to prepare an

EIS pursuant to NEPA will result in irreversible contamination of the aquifer causing a significant hazard to public health.

I. Factual Background

Planning for a roadway known as MoPac Boulevard began in the 1940's. The City Planning Commission of Austin, Texas prepare a transportation report in 1944 which reflected the use of the Missouri Pacific Railroad right of way for a thoroughfare. That thoroughfare, which runs north to south west of downtown Austin, approximates the existing location of MoPac Boulevard also designated as Loop 1. The concept of the MoPac roadway was developed over the next thirty years, and by 1966, U.S. 290 was planned to be the southern terminus of the highway. Extending MoPac beyond U.S. 290, where MoPac South is now being constructed, was not considered during that planning process. The existing MoPac is a highway 16 miles in length extending from FM 1325 north of Austin to U.S. 290 south of Austin. This portion of MoPac Boulevard has been operational over the entire 16-mile length for more than three years.

MoPac South was conceived as a major radial roadway serving southwest Austin south of U.S. 290 in the early 1980's. On January 11, 1984, the Austin City Council approved the MoPac South segment from U.S. 290 to a roadway planned for south Travis County. Subsequent to this approval, the planning and development of the MoPac South project began. MoPac South is planned to be an approximately 5.5 mile highway segment extending from the interchange of MoPac and U.S. 290 south to an interchange with proposed State Highway 45, the Austin Outer Loop.

The Austin Outer Loop is to be a major highway approximately 84 miles in length encircling Austin which was also conceived in the early 1980's. This highway has been

divided into five segments. The segment which is to be built in the southwest corridor of the Austin Outer Loop has been designated by SDHPT as Segment 3. See Appendix "B." Segment 3 is the portion of the outer loop which will intersect with the southern terminus MoPac South.

Both of these highways, MoPac South and Segment 3, traverse the Austin-area Edwards Aquifer. The Edwards Aquifer is a "major aquifer" in the state of Texas which covers approximately 4,350 square miles including a portion of south Travis County and Austin, Texas.[1] The Edwards Aquifer produces water from several layers of highly permeable and porous honey-combed rocks, known as "karst." Due to the extremely high permeability of these layers of rocks, wells pumping from this aquifer are among the most prolific in the world.[2] "Recharge" or addition of water to this aquifer primarily occurs by downward percolation of surface water from rivers and streams crossing the aquifer through crevices and faults in the underlying formations and secondarily by direct infiltration of precipitation on the outcrop of the karst.[3] Waters move regionally from these recharge areas to discharge at wells and naturally at numerous small and large springs. One such spring which this aquifer feeds is the "Barton Springs Pool"

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[1] Ground Water Quality of Texas--An Overview of Natural and Man-Affected Conditions, March 1989, Report 89-01, Texas Water Commission at 29. A major aquifer is defined as one which yields large quantities of useable quality water in a comparatively large area of the state. Approximately 96 percent of the ground water used in Texas in 1984 was produced from the major aquifers. Id.; see Appendix "A".

[2] Id. at 43.

[3] Id.

in Austin. Barton Springs is a natural wonder of great symbolic, recreational and economic value to Austinites.

Plaintiffs assert six claims for relief from the FHWA and the SDHPT in their Complaint. Plaintiffs' claims allege that Defendant FHWA is in violation of NEPA and the Federal-Aid Highways Act, 23 U.S.C. §§ 101, et seq.

Plaintiffs request a declaration that the Austin Outer Loop and MoPac South have environmental impacts requiring the preparation of a single NEPA EIS. Plaintiffs also seek an injunction barring any construction on or additional right-of-way acquisition for the Austin Outer Loop, or in the alternative for Segment 3, and MoPac South pending FHWA approval of a NEPA EIS.

Defendants deny the application of federal law to these two roadways which they claim are interdependent. They deny that they have arbitrarily divided the outer loop into segments to avoid federal environmental review. Both projects are asserted to be state funded projects which have been developed in accordance with all state and federal laws governing state projects. Because these projects are state funded, the Defendants claim they are not "federal actions" subject to NEPA. As an affirmative defense, Defendants claim Plaintiffs' suit is barred by laches.

II. Applicability of NEPA

The merits of Plaintiffs' relief turn on the question of the applicability of the following portions of NEPA:

> [T]o the fullest extent possible ...
>
> (2) all agencies of the Federal Government shall-- . . . (C) include in every recommendation or report on proposals for ... major federal actions significantly affecting the quality of the human environment, a

> detailed statement by the responsible official on--(i) the environmental impact of the proposed action . . . .

42. U.S.C. §4332 (1977) (emphasis added). This provision is expressly applicable to federal agencies, including the FHWA; and, pursuant to judicial interpretation, the provision is equally applicable to the construction of state highways when such construction involves "major federal action" which has a "significant affect" on the environment. Hawthorn Environmental Preservation Association, et al v. Coleman, 417 F.Supp. 1091, 1096 (N.D. Ga. 1976), aff'd per curiam, 551 F.2d 1055 (5th Cir. 1977). "Action" is defined as "[a] highway or transit project proposed for FHWA . . . funding." 23 C.F.R. § 771.107(b). "It also includes activities such as joint and multiple use permits, changes in access control, etc., which may or may not involve a commitment of Federal funds." Id. "Major federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18[4]

The fundamental purpose of NEPA is to compel federal decision makers to consider the environmental consequences of their actions. Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333, 1344 (5th Cir. 1979). The thrust of section 102(2)(c) of NEPA quoted above is that environmental concerns be integrated into the very process of agency decision-making. Andrus, 442 U.S. at 350.

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[4] This regulation is one of the regulations issued by the Council on Environmental Quality ("CEQ") to implement the procedural provisions of NEPA. CEQ regulations are entitled to "substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

Both federal and state Defendants maintain that the MoPac South and Segment 3 projects are neither federal-aid highway projects nor "federal actions" under NEPA. Because the Defendants consider both projects to be state undertakings, the Defendants argue that no federal EIS is needed. Therefore, the question which must be answered as to both of the roadways, is whether the projects involve "major federal action" as that term is applied under NEPA. Each project will be considered separately.

A. Segment 3 of the Austin Outer Loop

On October 29, 1984, the Travis County Commissioner's Court passed a resolution requesting the County of Travis, City of Austin and the SDHPT to act through the Austin Transportation Study Advisory Commission to consider the preliminary alignment and travel demand for an 82-mile, limited-access outer parkway encircling the city of Austin.[5] On March 21, 1985 a delegation of local officials appeared before the State Highway and Public Transportation Commission requesting construction of an outer parkway around Austin. On May 22, 1985, the State Highway Commission issued a Minute Order designating a state highway encompassing the City of Austin. The commission agreed to proceed with project planning of the highway including environmental reports. The commission also stated that the "... Parkway [Austin Outer Loop] will be developed in segments according to need and available funding; [t]he segments developed by the Department will be financed with Federal-aid funds whenever

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5 The William County Commissioners, the cities of Cedar Park, Manor, and Pflugerville all passed similar resolutions in March of 1985 endorsing the concept of a limited access parkway designed to loop the Austin metropolitan area.

possible.[6] The outer loop became a major feature of the Austin transportation plan in early 1986.[7]

As part of the planning process, SDHPT prepared an "overview environmental assessment" of the outer loop and submitted it to the FHWA in early 1987 for its approval. The state indicated that a "draft environmental impact statement" was appropriate, and acknowledged that this project may be added to the "Federal Secondary System."[8] Soon after SDHPT so informed FHWA, the FHWA published a Notice of Intent in the Federal Register on August 25, 1987. This notice announced to the public that an EIS would be prepared for each of four segments of a proposed highway project in Hays, Travis and Williamson Counties, Texas.[9] In this notice the FHWA states, "Federal funds will be used to finance project construction in each of the

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[6] SDHPT Minute Order, No. 83158, May 22, 1985.

[7] The entity officially responsible for transportation planning of the Austin area is the Austin Transportation Study Policy Advisory Committee ("ATSPAC") and is the entity that so designated the outer loop. The ATSPAC is a 17-member committee, the composition of which is determined by agreement of the SDHPT, the City of Austin and Travis County. A majority of the committee is state senators, representatives or employees. The chief executive officer of the SDHPT district in which Austin is located is a member of the ATSPAC.

[8] Letter dated January 14, 1987 from Frank Holzmann, Chief Engineer Highway Design, SDHPT, to John Conrado, Division Administrator, FHWA.

[9] Federal Register , Vol. 52, No. 164, Tuesday, August 25, 1987.

segments.[10]

On September 10, 1987, the SDHPT re-segmented the outer loop, dividing Segment 3 into Segments 3A and 3B, and at some point, SDHPT designated Segment 3A as a state-funded project.[11] The SDHPT re-segmented the outer loop several times and each time submitted the proposed segmentation to the FHWA for review. The FHWA expressed concern about the proposed segmentation by the state, and the state continually attempted to propose segments which would meet FHWA standards. As late as February 28, 1989, the FHWA was still working with the SDHPT to make certain the segments met certain requirements to permit the state to remain eligible for federal funds. At that time,

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10 Id.; In October 1987, the FHWA was still representing to the public that it was preparing federal environmental studies on the outer parkway as illustrated by FHWA's District Engineer, Gamaliel E. Olvera's, letter to the Travis Audubon Society. In that letter, Mr. Olvera says, "As the lead Federal agency for the preparation of the Environmental Impact Statements for the proposed Austin Outerparkway [sic], we can assure you that Federal laws and regulations regarding threatened and endangered species will be followed."

11 Segments 3A and 3B were eleven and fourteen mile segments of the original Segment 3 which did not have terminus at any roadway but simply connected to the remainder of the outer loop.

The Court finds no evidence of official action by SDHPT designating Segment 3 as state funded; however it must have been so designated sometime between October, 1987 and December, 1988. John J. Conrado, Division Administrator for the FHWA, wrote to the Barton Springs-Edwards Aquifer Conservation District (on December 21, 1988) thanking it for its concern, but since the SDHPT has chosen not to use federal funding for Segment 3A, the FHWA refuses to comment on the environmental consequences resulting from the design of this segment.

FHWA proposed that the project be divided into five segments which would all end at major radial roadways, and the SDHPT accepted this proposal. This segmentation is the current division of the outer loop, and the only segment planned for state funds is Segment 3. See Appendix "B".

During the years 1987, 1988 and 1989, SDHPT planned and is planning to use federal funds to help build the outer parkway.[12] The most recent status report, dated September 23, 1989, reflects that each segment of the outer loop, except Segment 3, is headed for some federal funding. This status report also shows that the only segment under construction is Segment 3. Construction on Segment 3 began December 12 or 13, 1989.[13]

The SDHPT's principal argument against the applicability of NEPA to Segment 3 is that no federal funding has been requested for any of the segments of the outer loop. However, SDHPT concedes that the SDHPT is retaining eligibility for federal aid funds.[14] SDHPT has contended

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12 In each Transportation Improvement Program drafted by the SDHPT for years 1987, 1988 and 1989 the Austin Outer Loop is planned to be construed with funds to be supplied by the FHWA.

13 Segment 3 has been the first portion of the outer loop to go to construction despite earlier planning of the SDHPT which prioritized Segment 4, first; Segment 1, second; and Segment 3, third in June 1986.

14 In addressing the Austin City Council on April 13, 1989, SDHPT spokesperson, Roland Gamble said:

> We are not passing up any federal funds. The Highway Department does not operate on a grant system. There are not funds designated for any particular project. It's as if you pour all those projects in a funnel, and up at the top you have got more projects than will ever come out the bottom.

throughout this litigation that federal funding is an absolute prerequisite to federal action within the meaning of the NEPA. However, as this Court has stated before, whether a project is a major federal action does not turn entirely on the question of funding.

The state may not disregard otherwise applicable federal environmental requirements solely on the basis of the funding question. Hawthorn, 417 F.Supp. at 1099. The absence of federal funding will not excuse noncompliance with NEPA requirements if the highway projects in issue are found to be segments of an overall federal construction project. Id. The state cannot subvert national environmental policy by shifting federal funds from an authorized project to avoid the ramifications of NEPA's commands. Named Individual Members of the San Antonio Conservation Society, et al v. Texas Highway Department, 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 701 U.S. 933 (1972).

On the other hand, "[i]t has been held consistently that the prospect of future federal funding does not make a project 'major federal action' for NEPA purposes during the planning stage." Macht v. Skinner, 715 F.Supp. 1131, 1134 (D.D.C. 1989). Therefore, the question is at what point

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> and when they come out the bottom, state or federal funds are utilized on [the] projects. When they come out the bottom and go to contract, sometimes they are funded with state funds. For some reason early on we decide that some projects should be state-funded, and then they go all the way through as a state-funded project. ... And so the fact that we are not spending federal funds on Segment 3 does not mean the state loses any federal funds. They still get the same amount of federal funds, and those funds will just go to other projects statewide. That's whey the Highway Commission started out and said it had the discretion--prerogative-- to make those things balance to the best interest of the State of Texas.

does a project become significant enough to be considered federal for the purposes of NEPA. The mere prospect of future federal funding is not enough, yet actual funding is not the deciding factor either.[15]

The Code of Federal Regulations prescribes the policies and procedures of the FHWA for implementing NEPA as well as the regulations of the CEQ, 40 C.F.R. Parts 1500-1508. 23 C.F.R. § 771.101. Further, these regulations set forth all FHWA requirements under NEPA for the processing of highway and urban mass transportation projects. Id. Section 711.113, titled "Timing of Administrative Activities," states that the FHWA will perform the work necessary to complete an EIS and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. However, some of the activities shall not proceed until certain conditions set out in this section have been met. Id.

Plaintiffs argue that FHWA's own interpretation of its regulations and this section regarding the timing of NEPA activities should determine at what point a project becomes subject to NEPA. FHWA has published its interpretation of Section 771.113 in the Federal Register. 52 Fed. Reg. 32649, August 28, 1987. In its interpretation, FHWA states that Section 771.113 places limits on the actions which FHWA may take to develop a project prior to the completion of the NEPA process:

> This limitation on actions supports one of the primary purposes of NEPA--that Federal agencies consider environmental effects fully, including alternative courses of action, before

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15 The Fifth Circuit has previously acknowledged that the law on this point is unclear. See e.g. Hawthorn, 417 F.Supp. at 1096; see generally Named Individuals Members, 496 F.2d 1017 (5th Cir. 1974).

> reaching a decision to proceed with major Federal Actions.
>
> * * *
>
> It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed.

Id. (emphasis added).

FHWA's interpretation of its own regulation forms the crux of Plaintiffs' argument for the application of NEPA. Plaintiff argues that the Austin Outer Loop is a larger project subject to federal environmental review of which Segment 3 is an integral part. Therefore, Plaintiff argues, this segment should be enjoined from further construction pending a final EIS on the entire loop.

Despite the above quoted regulation, the SDHPT continues to contend that since it has not asked for federal funding, this project is not subject to NEPA. A SDHPT Engineer, Mr. Billy Rogers, testified at trial that the state does not obligate itself to any federal regulations until the state has requested federal money pursuant to 23 U.S.C. § 105.[16]

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16 23 U.S.C. § 105 states that any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program of proposed projects for the utilization of the funds

Since none of these segments have been listed as a "105 Program" the State sees no obligation to comply with NEPA.

The witness offered by the FHWA to testify on this point was Peter Lombard, the Director of Program and Planning for FHWA. Mr. Lombard also stated a "proposal" for federal action as referenced in NEPA is a project for which a state has requested funding. He testified that only federal funding makes an action a "major federal action." Mr. Lombard offered no explanation for the difference between his interpretation of federal regulations and that interpretation published by his own agency in the Federal Register quoted above.

If a project became subject to NEPA only upon a request for funding pursuant to Section 105, the Court believes the FHWA's regulations would so state. Instead, Section 771.111, C.F.R., states:

> (b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action. ... [T]his is normally no later than the review of ... the approval of the 105 program (23 U.S.C. § 105).

(emphasis added). The language of this section indicates that the FHWA may take action from an unidentified point in time up to the time the project is approved pursuant to Section 105. No section of the regulations states that FHWA only becomes involved upon request of funding, and this conclusion is consistent with the policy of NEPA already discussed. Further, "major federal action" is defined in 40

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apportioned. The Secretary shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

C.F.R. Section 1508.18 as an "action with effects that may be major and which are potentially subject to Federal control and responsibility.[17]

In support of Plaintiffs' argument, they point out that all of the other segments of the Austin Outer Loop, Segments 1, 2, 4 and 5 are headed for some federal funding.[18] Mr. Billy Rogers, SDHPT engineer, testified that the state is anticipating receiving some federal money for the remaining segments. The estimated cost of the Austin Outer Loop is estimated to be somewhere between 400 and 800 million dollars. Mr. Rogers testified that at this price such a project would "not likely" be funded by the state alone.

The Defendants have maintained throughout this litigation that the Austin Outer Loop was not conceived as one project nor were the segments being proposed, planned, designed, or constructed as one project. However, the evidence does not support this contention. From its inception, the Segments have been considered exactly that, "segments" of a greater project. In fact, when the SDHPT first segmented the loop, the segments did not begin and end at major radial roadways. Only at the FHWA's insistence did SDHPT divide the loop at major radials. Each segment of the Austin Outer Loop therefore must be considered an

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17 This section of the regulations is titled "Terminology and Index" which is to be used specifically by the CEQ, but generally by the Federal Government. 40 C.F.R. §§ 1508.1 et seq.

18 The September 23, 1989 "Current Status Report" on the Austin Outer Parkway shows that the draft environmental impact statement on Segment 1 has already been submitted to FHWA. It shows the draft EIS on Segment 4 will be submitted to FHWA, and it shows FHWA submission is anticipated for the EIS's on Segments 2 and 5. It also shows Segment 4 is in the Section 7 consultation process under the Endangered Species Act.

integral part of the larger project. The Court acknowledges the fact that the SDHPT has not requested any federal aid for any section of the Austin Outer Loop. However, the probability of a request for federal funding is too great to allow the SDHPT to construct one portion of the loop without following federal law; otherwise, a prospective applicant could always circumvent NEPA by designating a portion of a larger project as state funded without affecting its eligibility for federal funds for the remaining portion.[19]

Additionally, SDHPT's motive for segmenting the portion of the loop which traverses the area most environmentally sensitive is naturally suspect. SDHPT did not originally plan for Segment 3 to be constructed first. Also, the Court finds no evidence of when and why Segment 3 was designated for state funds only. SDHPT's only stated reason has been that the state has that discretion. Further evidence of SDHPT's desire to avoid federal environmental law is the fact that construction on Segment 3 began in December, 1989 after SDHPT knew of the trial date in this case. Therefore, the Court is of the opinion that the Austin Outer Loop is a "proposal for major federal action" subject of an environmental document, and further that Segment 3 cannot be "segmented" from the overall proposal and funded separately before the environmental process pursuant to NEPA on the entire loop is completed.

B. MoPac South

South of Slaughter Lane, MoPac South has been

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[19] See Hawthorn, 417 F. Supp. at 1101-02 (N.D. Georgia), where the Court states "the prospects of its becoming a 'major federal action' are sufficiently great to warrant treating it as sufficiently federal for purpose of applying unified environmental standards to the entire project."

planned for construction simultaneously with the first leg of Segment 3 of the Austin Outer Loop because MoPac South "would otherwise have no logical connection with other existing roadways in the southern section of Travis County.[20] Since MoPac South has been planned for construction as a part of Segment 3 which this Court has found to be an integral part of a federal project, MoPac South must necessarily be an integral part of a federal project and subject to NEPA.

III. Laches

Three independent criteria must be met before laches can be invoked to bar litigation, and the burden of proof is placed on the party asserting the defense of laches. Mutual Life Insurance Co. of New York v. Bohart, 743 F.2d 313, 326 (5th Cir. 1984). "The defendant must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." Save Our Wetlands, Inc. v. United States Army Corps of Engineers, 549 F.2d 1021, 1026 (5th Cir.), cert. denied, 434 U.S. 836 (1977); Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 478 (5th Cir. 1980). Whether laches bars an action in a given case depends upon the circumstances of that case and is "a question primarily addressed to the discretion of the trial court." Gardner v. Panama R. Co., 342 U.S. 29, 30 (1951). The applicability of the doctrine to environmental litigation is no longer open to doubt. Environmental Defense Fund, 614 F.2d at 478.

The defense of laches is available in environmental

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20 The development of MoPac South and Segment 3 as one project was announced by the Corporation and published by the FHWA in its publication "Highway Financing Briefs" dated January 1988.

litigation but is disfavored because of the public interest in environmental quality and compliance with Congress' environmental policy. Association Concerned About Tomorrow, Inc. v. Dole, 610 F.Supp. 1101, 1118 (N.D. Tex. 1985). A laches defense in environmental cases has succeeded only where a substantial portion of the project has been completed at the time the suit was filed. Id. at 1119.

A. A Delay in Asserting a Right or Claim

This Court has already found that Plaintiffs did delay asserting their claims; therefore, this issue will not be discussed.[21] Next, the Court will consider the final two elements of the laches defense as they relate to Segment 3 and MoPac South respectively.

B. Excusable Delay and Undue Prejudice to Defendants

1. Segment 3

Defendant Corporation argues that "Plaintiffs' entire case on Segment 3 focuses on one feature--segmentation."[22] Therefore, Defendant contends Plaintiffs should have challenged the outer loop segmentation when the proposed segmentation was made public in August of 1987. Defendant Corporation further contends the FHWA regulations require administrative steps which are designed to provide quick and accurate notice to interested persons, and if Plaintiffs had

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21 Order dated December 8, 1989 at 5.

22 MoPac South Transportation Corporation's Written Closing Argument (J.B. Ruhl) at 13.

simply inquired as to why these procedures were not being followed, they would have quickly discovered that the environmental reviews being conducted were not prepared pursuant to federal law.

The "Notice of Intent" was published by the FHWA in October of 1987 informing the public that EIS's would be prepared on all four segments of the outer loop. As this noticed indicated, the state did begin to prepare EIS's on all four segments. However, the statement being prepared on Segment 3, then Segment 3A, was different from the others. The Segment 3A EIS was a "state" EIS--not one prepared pursuant to federal law. Although a draft of this statement was released by SDHPT in November 1988, but the draft gave no indication that it was anything other than a federal EIS.[23] Further, SDHPT continued to show Segment 3 as a federally funded project on its Transportation Improvement Program and Annual Element for the years 1987-88, 1988-89, and 1989-90.

Mere negligence to challenge an action is not sufficient to establish laches in any case. Environmental Defense Fund, 614 F.2d at 479. The Defendants must show that those

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23 A public hearing was held on November 3, 1988 on Segment 3A which SDHPT argues Plaintiffs neglected to attend. However, the agenda of that meeting makes no mention of the fact that the EIS being discussed was not being prepared pursuant to federal law. Additionally, no evidence was presented that State regulations or rules regarding the preparation of EIS's exist, so Plaintiffs were safe to assume that the EIS was being prepared according to federal rules.

Defendants argue that it was openly apparent as early as June of 1988 that construction was proceeding with state and private funding. However, Plaintiffs produced a letter dated June 3, 1988 from Roland Gamble, District Planning Engineer of SDHPT, to a real estate firm that inquired about the status of the loop. In that letter, Mr. Gamble details the environmental review process but makes no mention of a state and federal process.

whom it seeks to bar by invoking laches were or should have been aware of the questionable nature of the government's activity. Id. Along those lines, when government action is involved, members of the public are entitled to assume that public officials will act in accordance with the law. Id.; Save Our Wetlands, 549 F.2d at 1027-28; Clark v. Volpe, 342 F.Supp. 1324, 1328-29 (E.D. La. 1972), aff'd per curium 461 F.2d 1266 (5th Cir. 1973).

When Plaintiffs did begin to inquire about the status of the environmental review process in early 1989, their efforts were thwarted by both the federal and state Defendants. The SDHPT advised its staff by memo dated May 11, 1989, that they were to give no information to Save Barton Creek Association regarding scheduling. FHWA refused Plaintiff's Freedom of Information Act requests on June 30, 1989, claiming that SDHPT was acting as a "consultant" in preparing the EIS's for purposes of NEPA. The parties have stipulated that no officer or director of any of the Plaintiff organizations, prior to November 1988 had actual knowledge that Segment 3A Draft EIS was not a NEPA document. Not until August 1989 did Plaintiffs learn that Segment 3 was state funded.

In light of the above facts, the Court finds that Defendants have failed to uphold their burden to show Plaintiffs should have been aware of the questionable nature of the SDHPT's activity. The public should not be required to assume the law is not being followed and investigate. Yet, when Plaintiffs did investigate they were immediately turned away by SDHPT. SDHPT's intentions regarding Segment 3 may have been on the "up and up"; however, the evidence does not reveal any measurable good will on the State's part. Barring Plaintiffs' claim by laches would be inappropriate for that reason alone considering the equitable nature of the defense.

Finally, Defendants have very little room to claim

undue prejudice from Plaintiffs' delay in filing suit considering construction of Segment 3 did not begin until December 1989.[24]

2. MoPac South

An abundance of evidence has been presented throughout this litigation regarding Plaintiffs' diligence, or lack thereof, regarding claims on MoPac South. Essentially, the Defendants contend Plaintiffs' suit was ripe in 1986 and if Plaintiffs were not, in fact, aware of funding on MoPac South, they should have been. Plaintiffs contend, however, that Defendants deceived them and their deception prevented Plaintiffs from filing suit earlier. The evidence clearly shows, however, that, the State decided to proceed with exclusively state funding in October of 1986. Thereafter, the State was forthcoming and unambiguous about its plans regarding MoPac South.[25] Plaintiffs never inquired as to the

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[24] Mr. Thomas Word, an engineer with SDHPT, testified that Segment 3 is approximately 10% complete measured in dollars spent as compared to dollars budgeted.

Also worthy of note is that on September 16, 1989, SDHPT's designated representative for its deposition did not know when construction bids for the first work on Segment 3 would be requested. The first construction work began December 12 or 13, 1989.

[25] The draft EIS and the status of MoPac South were the subject of several public meetings. Notice of these meetings was published in the Austin American Statesman and posted with local, county and state officials. These meetings were being held as early as the latter part of 1986. An officer of Plaintiffs' organizations attended a December, 1986 public hearing and expressed his intention to thoroughly review the draft EIS and submit any comments or concerns regarding that document. Plaintiffs never submitted such comments.

funding status or environmental review procedures of MoPac South nor did Defendants misstate the funding sources or environmental review procedures being used.[26] Therefore, Plaintiffs' delay borders on the line of being inexcusable; however, the Court will not resolve this dispute. Rather, the Court will focus on whether the prejudice to Defendants is undue simply because the potential harm to Defendants is so great if Plaintiffs prevail on their claims regarding MoPac South.

Commencement of construction on MoPac South was announced in an article appearing in the April 28, 1988 issue of the Austin American Statesman, and construction began soon thereafter.[27]

As of this date, construction of MoPac South from U.S. 290 to Slaughter Lane is 96% complete, and construction of MoPac South from Slaughter Lane to Hannon Lane is 42% complete.[28] The SDHPT has expended over $10,000,000 in the construction of MoPac South, and the Corporation has by its efforts donated over $10,000,000 worth of right-of-way and services to the State for MoPac South. Additionally, local governments have expended

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[26] Plaintiffs have argued throughout that Defendants' deception regarding MoPac South kept them from discovering the true nature of the EIS being prepared. However, Defendant Corporation makes a point in its written closing argument which is well-taken: "If indeed they [Plaintiffs] did think MoPac South was undergoing NEPA review, why did they never avail themselves of numerous opportunities to comment on the adequacy of the environmental impact statement?" Written Closing Argument at 7.

[27] Despite gap, extension of MoPac begins, Austin American Statesman, April 28, 1988.

[28] Testimony of Thomas Word, SDHPT engineer.

substantial funds to develop infrastructure to be used in southwest Travis County based on the assumption that MoPac South would be available for traffic use in 1990.

The Court acknowledges the futility of enjoining the construction of MoPac South from U.S. 290 to Hannon Lane. However, construction of MoPac South from Hannon Lane south to the proposed intersection with Segment 3 is not yet under way. Since MoPac would not have a road to otherwise intersect if construction of Segment 3 is enjoined, Defendants will not be unduly prejudiced by Plaintiffs' delay.[29] Therefore, laches will bar Plaintiffs' claims regarding MoPac South from U.S. 290 to Hannon Lane because the delay, whether excusable or not, results in great prejudice to Defendants. However, any claims regarding the final leg of the project, from Hannon Lane South, will not be barred.

VI. Remedy

The normal remedy afforded by the courts for a NEPA violation is an injunction prohibiting construction and maintaining the status quo until the agency has complied with the statutorily required procedures. Richland Park Homeowners Association v. Pierce, 671 F.2d 935, 941 (5th Cir. 1982).[30] An injunction of the federal action at issue is often appropriate but should be limited by general equity principles. Environmental Defense Fund, 651 F.2d at 1005-

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[29] Defendant Corporation acknowledges that the final phase of MoPac South is "very much influenced" by construction of Segment 3.

[30] But see Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988) where court held that NEPA does not mandate an injunction; see also Amoco v. Village of Gambell, 480 U.S. 531 (1987).

06. To allow additional investment in a particular course of action prior to completion of the NEPA process tends to undermine the role of the NEPA alternatives analysis in the agency decision-making process. One beneficial effect of such injunction is to maintain the status quo so that the relevant decision makers and the public may still have the opportunity to choose among alternatives, as required by NEPA. Id. Another purpose is to provide the agency with an incentive to comply with NEPA in as rapid and thorough a manner as is reasonably possible. Id.

Defendants first argument against an injunction is that the roadways will relieve traffic congestion in southwest Travis County and benefit the public health and welfare. However, Defendants' exhibits clearly show that south of Slaughter Lane the vast majority of the area surrounding MoPac South is undeveloped. Defendants next argue that the roadways are already under construction at great cost to SDHPT. This may be true, but again Defendants were aware of the risk they were taking when they began construction on Segment 3 after this lawsuit was filed.

Next, Defendants argue that requiring the completion of an EIS on Segment 3 would have no effect because the State has already chosen not to seek federal funding, and is probably no longer eligible for funding. Perhaps the State has foregone its chance of receiving federal money to construct this segment, but, as already stated, funding alone does not determine whether federal environmental law applies. Defendants also warn of the probability of future litigation over the proper procedures; however, the threat of future litigation should not preclude injunctive relief.

Finally, Defendants contend that the secondary development effects of the roads will be controlled by local regulations, such as the existing Comprehensive Watershed Ordinance and proposed Texas Water Commission regulations, so an injunction is not necessary to ensure such

controls are put in effect. Hence, an injunction is not needed and would do more harm than good.[31]

Instead, the Corporation suggests that the Court "could fashion a supplemental EIS requirement for the State to satisfy and track through the FHWA review and public comment procedures within a time frame specified by the Court."[32] SDHPT also argues that Plaintiffs are not entitled to injunctive relief because they have never been able to quantify any harm to the aquifer.

Plaintiffs urge this Court to issue an injunction to halt

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[31] Defendants spent a lot of time at trial presenting the Court with evidence of the protections already provided by the Comprehensive Watershed Ordinance and proposed Texas Water Commission regulations.

The Watershed Ordinance, No. 860508-V, was established pursuant to Texas Legislature directive that every city with a population of 5,000 or more shall establish a water pollution control and abatement program. Texas Water Code, Section 26.117(a).

The City of Austin, through its Amicus Curiae Brief, has informed the court that many of the municipal utility districts about which Defendants spoke so highly are grandfathered from the Comprehensive Watershed Ordinance which is applicable in Austin's Extra-Territorial Jurisdiction. Further, the City argues that the Comprehensive Watershed Ordinance will not fully explore the environmental consequences of the construction of the southernmost extension of MoPac and Segment 3 as an EIS would. See Supplement to City of Austin Amicus Curiae Brief at 5-11.

Additionally, the Court finds it interesting that the Austin City Council instructed its City Attorney to file an amicus curiae brief, strongly urging this Court to enjoin the construction of these projects, which have been planned and sought by other "city fathers" for almost one-half a century.

[32] MoPac South Transportation Corporation's Written Closing Argument (J.R. Ruhl) at 18.

construction on MoPac South south of Slaughter Lane and Segment 3 citing the risk of contamination to the aquifer and the risk of destruction of habitat for endangered species. Evidence offered by both parties at trial revealed the sensitivity of the aquifer and the surrounding environment, thereby making the granting of an injunction the most appropriate remedy.

This Court cannot practically determine what environmental studies need to be conducted on these projects as the Corporation suggests. The Court trusts that the federal law is clear on a requirements of the NEPA EIS, and that federal environmental law will define what necessary work needs to be done. Furthermore, SDHPT must be aware of and very familiar with the requirements of a federal impact statement considering the fact that the four remaining segments of the outer loop are currently in the environmental review process.

Plaintiffs also request that this Court order one EIS be prepared for MoPac South and the Austin Outer Loop citing the U.S. Supreme Court case of Kleppe v. Sierra Club, 427 U.S. 390 (1975). Kleppe stands for the proposition that NEPA may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. Id. at 409. When actions will have a cumulative or synergistic environmental impact upon a region and those actions are pending concurrently before an agency, their environmental consequences must be considered together. Id. at 410; see also 40 C.F.R. § 1508.25.

Kleppe goes on to say, however, a "regional environmental impact statement" will be prepared unless a previous EIS has sufficiently analyzed the impacts of the proposed actions. Id. at 411 (emphasis added). The determination of the region with respect to which a comprehensive statement is necessary requires a high level of technical expertise and is properly left to the informed

discretion of the responsible federal agencies. Id. Absent a showing of arbitrary action, the Court must assume the agencies have exercised this discretion appropriately. Id.

In this case, the SDHPT has submitted EIS's on the remaining four segments and at no point has the FHWA instructed SDHPT to prepare a regional EIS. The decision to prepare separate statements is better left to the experts. This Court is not in the position to decide whether the entire loop should be considered in one statement. Rather, SDHPT will be ordered to prepare an EIS on Segment 3 just as it has on the remaining four segments. Accordingly,

IT IS ORDERED that Defendants FHWA and SDHPT, and Defendant-Intervenor MoPac South Transportation Corporation, their employees, agents, consultants and contractors are hereby enjoined from any and all construction and development activities on (1) the Austin Outer Loop, (2) Mopac South south of Hannon, until such time as the procedures provided under the National Environmental Policy Act for major federal action significantly affecting the environment are completed.

IT IS FURTHER ORDERED that additional surveying or preliminary engineering work on the Austin Outer Loop prior to completion of the National Environmental Policy Act procedures shall be strictly limited to that which is necessary to evaluate potential impacts of the proposed project and any alternative alignments or proposals.

IT IS FURTHER ORDERED that until such time as the above required procedures are completed, Defendant SDHPT shall undertake the following interim measures to protect the existing environment from runoff from construction already initiated on MoPac South and F.M. 1926:

(a) stabilize all construction areas, using berms or double rows of filter fences where necessary, so that no sediment or other construction pollutants may exit presently

disturbed areas;

(b) revegetate any cleared but not yet paved areas using native grass mix (exotic grasses like King Ranch bluestem should not be used). In revegetating, chemical hydromulch should not be used, nor should fertilizers be used beyond the minimum necessary to allow initial establishment of grasses.

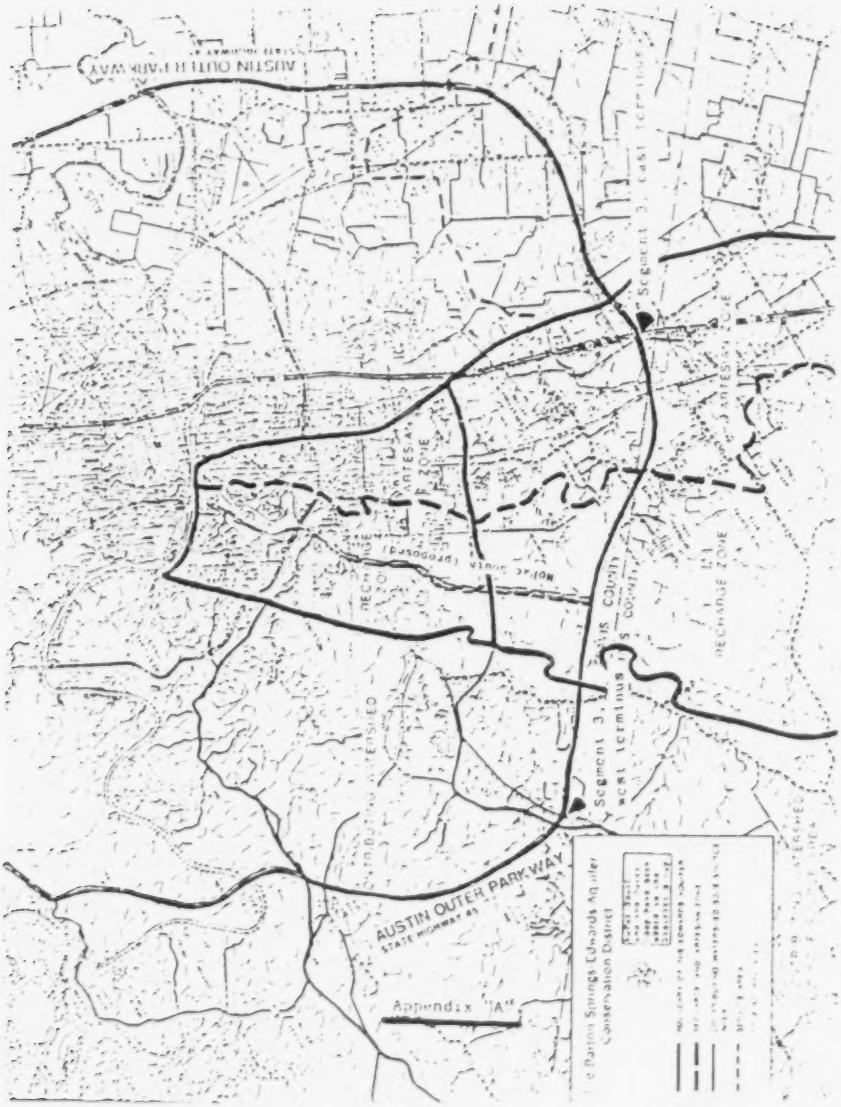
(c) Regularly maintain berms, filter fences, and all other sedimentation controls in order to insure that no sediment or construction pollutants exit the site. All temporary sedimentation control measures should be inspected and, if necessary, repaired or replaced, immediately following any rain of more than 0.20 inches.

(d) All construction related or other chemical products, hazardous or non-hazardous, shall be removed from the above-described project sites.

IT IS FURTHER ORDERED that the Plaintiffs submit an affidavit of attorney's fees within twenty (20) days of entry of judgment in accordance with Local Rule 300-9.

SIGNED this 6th day of March, 1990

/S/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE


AUSTIN OUTER PARKWAY
STATE HIGHWAY 45
Segment 3 west terminus
Segment 3 east terminus
RECHARGE ZONE
Appendix "A"

Appendix "B"

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action A-89-CA-719

(April 5, 1990)

SAVE BARTON CREEK ASSOCIATION, WE CARE AUSTIN and AUSTIN CROSSROADS,
Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION (FHWA) and TEXAS STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION,

Defendants,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,
Intervenor.

ORDER

Came on this day to be considered Plaintiffs' Rule 52(b) Motion and Brief for Additional Fact Findings and Plaintiffs' Rule 59(e) Motion and Brief to Amend Judgment. Plaintiffs request four additional fact findings and

amendments to the Memorandum Opinion and Order and the Judgment entered on March 6, 1990.

Plaintiffs first request that the first full paragraph on page 29 be amended so that its introductory clause reads:

> IT IS FURTHER ORDERED that until such time as the above required procedures are completed, Defendant SDHPT shall undertake the following interim measures to protect the existing environment from runoff from construction already initiated on MoPac South south of Hannon Lane and on the Austin Outer Loop from its proposed intersection with MoPac South to FM 1826:

The Defendants, with the exception of the FHWA who requests the denial of all of Plaintiffs' amendments, agree that this change should be made, so this request will be granted. Accordingly,

IT IS ORDERED that the first full paragraph on page 29 of the Court's Memorandum Opinion and Order and the first introductory clause to the last paragraph on page 1 of the Judgment are so amended.

Second, the Plaintiffs request that crushed limestone which has been laid east of F.M. 1826 on the Outer Loop be "penetrated to allow moisture migration and be covered with topsoil and revegetated." The SDHPT recognizes that the area in question cannot be maintained in its current state because to do so would result in "degradation of the compacted base and an increased potential for erosion." However, SDHPT argues that revegetation of the area is not feasible because moisture from the natural ground surface will not be able to reach the vegetational root systems underlying the stone base bed. SDHPT maintains the best way to stabilize this portion of the construction area is to

place a seal coat, which is a thin spray of asphalt binder covered with clean rock, over the base already in place. The Court agrees that this would be keeping with the Court's finding that all construction areas be stabilized; therefore, Plaintiffs' second request **DENIED**.

Third, Plaintiffs have moved the Court to amend its Order and Judgment to state that laches only bars Plaintiffs' claims regarding the 1991 phase of MoPac South from U.S. 290 to Hannon Lane, and not the 2006 phase. Defendants argue that the Court correctly barred Plaintiffs' NEPA claims for the MoPac South roadway north of Hannon Lane, thereby precluding any attempts by Plaintiffs to impose NEPA on SDHPT for that portion of road, regardless of the "phase" of construction. The Court was unaware of the "phased construction" of MoPac South, and never intended to differentiate between the 1991 and the 2006 phase. Therefore, this request for amendment is also **DENIED**.

Finally, Plaintiffs suggest the following addition to the Court's finding that MoPac South is subject to NEPA:

> MoPac South is further subject to NEPA because the project is an extension of a federal project (MoPac), a connection of three federal projects (MoPac, U.S. 290 and the Austin Outer Loop), and it lacks substantial independent utility. See Hawthorne, 417 F.Supp. 1091; Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 440 (5th Cir. 1981).

Defendants believe such an amendment would be improper, and would be an error of fact. The Court disagrees, and this request will be granted. Accordingly,

IT IS ORDERED that this sentence be added to the conclusion of paragraph II.B., page 17 of the Memorandum

Opinion and Order.

SIGNED this 5th day of April, 1990.

/S/ / Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8036

SAVE BARTON CREEK ASSOCIATION,
WE CARE AUSTIN and AUSTIN CROSSROADS,

Plaintiffs-Appellees and Cross-Appellants

versus

FEDERAL HIGHWAY ADMINISTRATION (FHWA)
and TEXAS STATE DEPARTMENT OF HIGHWAYS
and PUBLIC TRANSPORTATION,

Defendants-Appellants and Cross-Appellees,

and

MOPAC SOUTH TRANSPORTATION CORPORATION,

Intervenor-Defendant and Appellant-Cross-Appellee.

Appeals from the United States District Court for the

Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 1-17-92, 5 Cir., 198_, ___F.2d___)

(February 24, 1992)

Before WILLIAMS and BARKSDALE, Circuit Judges.*

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ J.S. Williams
UNITED STATES CIRCUIT JUDGE

*Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992, and, therefore, did not participate in this decision. This matter is being decided by quorum.

DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
Urban Mass Transportation Administration

Section-by-Section Analysis of
Environmental Impact and Related Procedures
(52 Federal Register 167 [pp.32,646, et seq. - 8/28/1987])

Section 771.113 Timing of Administration Activities.

This section describes the timing of various project development activities in relation to the completion of the environmental process. It places limits on the actions which the Administration and the applicant may take to develop a project prior to the completion of the NEPA process.

The language in paragraph (a) supports, and should be read in conjunction with, section 1506.1 of the CEQ regulations, "Limitations on actions during NEPA Process." These provisions ensure that the Administration's decision whether to implement an alternative under consideration in the environmental document will not be influenced by a previous commitment to a particular course of action. As such, the strictures apply not only to the Administration and applicants, but also third parties acting under a contractual agreement. Furthermore, the Administration or the applicant cannot prematurely enter into a contract which irrevocably binds it to the future performance of this work. This limitation on actions supports one of the primary purposes of NEPA - that Federal agencies consider environmental effects fully, including alternative courses of action, before reaching a decision to proceed with major Federal actions.

The wording in this paragraph has been revised to make clear the kinds of activities that will be allowed prior to

the completion of the NEPA process. This will include any impact studies and engineering work needed to complete the environmental document. Normally, preliminary design will provide all the project information needed to satisfy environmental requirements. In certain cases, more detailed design work will be needed to satisfy a specific environmental requirement and this additional design work is allowed. This paragraph has also been changed to expand on the kinds of activities which may not occur prior to completion of the NEPA process.

[1]

It is important to note that the limitations on premature commitments in the CEQ regulations and this regulation apply to projects or activities that may be proposed entirely for local funding by an applicant or prospective applicant. If the action in question is an integral part of a larger project which is the subject of an environmental document, that action cannot be "segmented" from the overall proposal and funded separately before the environmental process is completed. Segmentation of a project might involve the early acquisition of property or the purchasing of rolling stock, construction materials, or other equipment needed during the construction phase. Segmentation could also entail separate development by the applicant of an entire portion of a project. e.g., a segment of highway or transit guideway that should be considered as part of a larger project for which Federal assistance is being sought.

A number of commenters suggested revisions to his section to permit the applicant to proceed with final design activities after the receipt and evaluation of comments on the draft EIS and prior to approval of the final EIS. The

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1 The box around this paragraph is Petitioners'.

commenters contended that the EIS approval process delayed the start of final design work and, therefore, induced delays in all subsequent phases of the project development process. They suggested that if no environmental concern were raised during the draft EIS circulation period, final design of the preferred alternative should be allowed to proceed. The Administration has carefully considered these comments and continues to believe the environmental process must be completed and the EIS approval made before it is in a position to permit the applicant to proceed with final design activities. We recognize the need to develop preliminary designs in order to more accurately assess impacts in the environmental document. However, granting approval to proceed with final design at this stage would be a premature commitment to one alternative at a time when other alternatives, including the alternative of taking no action, are still being actively considered by the Administration in the environmental process.

However, the Administration recognizes the need to proceed with detailed design activities where such work is necessary to permit the full evaluation of environmental impacts and to permit the consideration of appropriate mitigation measures, e.g., impacts to wetlands, section 4(f) areas and resources covered by section 106 of the National Historic Preservation Act (section 106). The regulation provides for those situations by allowing the applicant to complete all necessary design work needed to complete the EIS or to comply with other environmental laws during the NEPA process. This should not be construed as an authorization to proceed with final design for the entire project, but only for those aspects of the project necessary to consider specific environmental concerns.

The possibility of acquisition of land for a project before completion of the NEPA process was raised by several commenters. The UMTA received comments in

favor of both expanding and restricting the scope of advance land acquisition allowed under the regulation. Several commenters suggested that UMTA expand the scope of advance land acquisition because the Surface Transportation Assistance Act of 1982 (STAA) amended section 3(a)(1)(A) of the UMT Act by adding a provision specifically addressing UMTA's discretion to make grants or loans for the acquisition of rights-of-way and relocation for fixed guideway corridor development for projects in advanced stages of alternatives analysis or preliminary engineering. On the other hand, one commenter expressed the opinion that "no acquisition should be allowed prior to completion of the NEPA, process," arguing that hardship or protective buying cannot be accomplished without influencing or limiting the choice of reasonable alternatives.

In weighing the arguments, UMTA considered how to implement the STAA amendment consistently with the agency's responsibilities under NEPA and with the results of pertinent case law governing advance land acquisition. National Wildlife Federation vs. Snow, 561 F.2d 227 (D.C. 1976). The UMTA has concluded, in light of these considerations and a review of the pertinent legislative history, that this amendment was not intended to override the requirements of NEPA.

For UMTA's major fixed guideway projects, the draft and final EISs are developed during alternatives analysis and preliminary engineering. Any authorization for advance land acquisition during alternatives analysis or preliminary engineering would create a conflict with NEPA if the acquisition could result in a substantial commitment to a particular course of action before the NEPA process was completed. In addition, since UMTA's major investment procedures are integrated with the NEPA process, this would also prejudice the major investment decisionmaking process.

After careful review, FHWA and UMTA still believe

that some advance land acquisition may take place on a case-by-case basis without resulting in a substantial commitment to a particular course of action before completion of the NEPA process. Therefore, in this regulation, FHWA and UMTA are maintaining the current practice: that is, the only types of advance land acquisition that FHWA and UMTA will approve before the completion of the NEPA process are "hardship" and "protective" acquisitions. These terms are defined in § 771.117(d)(12) of this regulation.

As in the past, this type of land acquisition is reserved for extraordinary or emergency situations involving a particular parcel or a limited number of parcels within the proposed transportation corridor. It has been FHWA's and UMTA's recent experience that the number of hardships and protective acquisitions on a given project are so few as to not result in a substantial commitment to a particular course of action. The purpose of protective acquisition is to preserve the status quo. Since it serves to protect valuable property and can be easily undone, such acquisition generally will not tilt the balance toward a particular alternative.

Another question is whether acquiring an option to purchase land before completing the environmental process would be an acceptable alternative to assure the availability of land for project purposes. It would be less costly and arguably would constitute a smaller commitment than the actual purchase of land. Generally, UMTA and FHWA maintain that acquiring options to purchase land for a project would tend to bias fair consideration of other project alternatives and violate basic principles of Federal environmental law. Therefore, the same standards apply to options to purchase as to outright purchase of land: before completing the environmental process, only acquisitions for hardship and protective purposes are acceptable.

To obtain approval for hardship or protective acquisition, the applicant should apply for a CE under

paragraph 771.117(d)(12). In addition, for FHWA actions, hardship and protective acquisition activities must be processed in accordance with 23 CFR 712.204(d). It should be noted that a CE for advance land acquisition applies only to the purchase of property and does not permit further project development. The restrictions of paragraph 771.113(a) will apply until the Administration completes the NEPA process for the entire proposed action. The FHWA has issued guidelines and UMTA is preparing similar guidance describing the documentation needed to support requests for hardship and protective buying. Documentation supporting these claims will continue to be reviewed in the field offices of FHWA and UMTA.

One commenter suggested that any advance land acquisition be noted in the subsequent EIS or EA. The FHWA and UMTA have no objection to noting this information in environmental documents, but do not believe it is appropriate to require it under the regulation.

Paragraph (a)(3) has been added to emphasize that in addition to environmental requirements, certain programming requirements must be satisfied prior to the initiation of FHWA funded final design, acquisition, and construction activities. This paragraph is a cross reference to 23 CFR Part 450 and 23 CFR Part 630 and does not create any additional requirements.

Paragraph (b) has been revised to indicate that FHWA approval of the final environmental document is considered acceptance of the general project location and project concepts such as type of facility, interchange locations, and other major features which may be indicated in the environmental document. This paragraph is an indication that FHWA normally will approve for Federal funding a project of the type noted in the final environmental document. However, it does not commit the Administration to fund any specific project or any features identified therein. Final approval of

the EIS does not constitute a commitment to fund the project, as noted in this paragraph and in § 771.125(e) of this regulation.